In The
UNITED STATES COURT OF APPEALS
For The Eighth Circuit

Nos. 18-2370, 18-2568

SOUTHERN BAKERIES, LLC,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

Respondent.

On Petition for Review from the National Labor Relations Board

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BRIEF FOR THE PETITIONER

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This case is about a commercial bakery's enforcement of its rules to protect employees against physical intimidation in the workplace and to protect the public against contamination of its product. Petitioner, Southern Bakeries, LLC ("SBC"), provided a last chance agreement to Lorraine Marks-Briggs ("Briggs") after she ate food product off the line, in violation of SBC's rules, food safety standards, and a mandate from her supervisor. A few months later, Briggs ignored another directive from management against workplace intimidation, antagonizing a coworker by entering that employees' workstation and intentionally bumping into her. SBC discharged Briggs' for her misconduct.

The NLRB Decision on May 1, 2018 ("the Decision") acknowledged that Briggs broke the rules. Inexplicably, however, the Decision found Briggs' discipline to be unlawful. The Decision ignores the context behind SBC's decision, including that the decision makers had no knowledge of Briggs' union affiliation. By doing so, the Board has impermissibly substituted its judgment for that of a company's management in a matter of employee safety and consumer protection. Oral argument (at least ten minutes per side) is necessary to address this overreach of authority and errors in the Board's analysis.

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-2370, 18-2568

Short Caption: Southern Bakeries, LLC v. National Labor Relations Board

(1) The full name of every party that the attorney represents in this case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3): Southern Bakeries, LLC

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court: Bose McKinney & Evans LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and
N/A

ii) List any publicly held company that owns 10% or more of the party's or amicus' stock:
N/A

September 24, 2018 s/*David L. Swider*
David L. Swider

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes X No ____

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JURISDICTIONAL STATEMENT

The National Labor Relations Board had jurisdiction over the alleged unfair labor practices that were filed against SBC pursuant to 29 U.S.C. § 160(a) in relation to its operation of a bakery in Hope, Arkansas. The NLRB entered its Decision and Order on May 1, 2018, and SBC timely filed its petition for review on June 25, 2018. The Board filed a cross-application for enforcement on July 23, 2018. This Court has jurisdiction over this matter pursuant to 29 U.S.C. § 160(f)

STATEMENT OF ISSUES

1. Whether a commercial bakery violates the National Labor Relations Act by disciplining an employee for violating its reasonable rules against food product contamination and workplace physical harassment where the evidence is unrebutted that the decision makers were not motivated by anti-union animus or any other reason prohibited by the Act.

Most Apposite Authority

29 U.S.C. § 157

29 U.S.C. § 158

Nichols Aluminum, LLC v NLRB, 797 F.3d 548 (8th Cir. 2015)

2. Whether substantial evidence supports the NLRB's conclusion that the company told an employee not to discuss her discipline with other employees and that she was being discharged for discussing such discipline.

Most Apposite Authority

29 U.S.C. § 157

29 U.S.C. § 158

STATEMENT OF THE CASE

I. Facts Relevant to the Issues Submitted for Review

A. Company background and work rules

SBC is a bakery in Hope, Arkansas, which employs approximately 400 employees. (A2, Jt.App.228.)[1] SBC has an Employee Handbook that is distributed to all employees and contains Facility Rules and Disciplinary Procedures. (Jt.App.702-712, 215.)

The Facility Rules consist of three groups of disciplinary violations: Groups A, B and C. Group A Rule infractions are the most serious, are immediate discharge offenses, and are not on a progressive discipline system. (Jt.App.710-711.) One of the Group A Rules, Rule 3, prohibits leaving the employee's assigned job or work area without permission. (*Id.*) Group A, Rule 22, also prohibits leaving an assigned work area without permission. (*Id.*) Group A, Rule 5, proscribes workplace violence and harassment, including, provoking a fight or intimidation. (*Id.*) Another Group A Rule, Rule 6, prohibits insubordination, including disobeying instructions. (*Id.*)

[1] "A" references the Addendum attached to this brief.

Group B Work Rules generally follow a three-step progressive disciplinary process; however, SBC reserves the right to escalate the disciplinary process (including proceeding directly to discharge) depending on the severity and/or frequency of the offense. (Jt.App.711-712.) Group B, Rule 3, prohibits "Eating or drinking (with the exception of company provided liquids) outside of production or distribution facility break areas." (*Id.*) Group B, Rule 13, provides that failure to observe facility safety or good manufacturing rules is a disciplinary offense. (*Id.*) One of the Bakery's Good Manufacturing Processes (GMPs) prohibits employees from eating on the production floor. (Jt.App.708.)

The purpose of this and the other GMPs is to assure consumer safety and compliance with regulatory safe quality food requirements. SBC is subject to a specific set of industry standards focusing on food safety. (Jt.App.216.) SBC is certified by the SQF Institute, which provides a code of specific good manufacturing processes. (Jt.App.216-219, 613-616, 617-657.) If SBC fails to comply with those standards, it risks the suspension or loss of its certification, which would prevent it from selling its products. (Jt.App.218.) A breach of those standards also

places the general public at risk of contamination and foodborne illness. *See* Center for Disease Control and Prevention, "Foodborne Germs and Illnesses," https://www.cdc.gov/foodsafety/foodborne-germs.html (last visited Sept. 11, 2018) (noting that each year 48 million people get sick from a foodborne illness, 128,000 are hospitalized, and 3,000 die).

Among other things, the SQF Code requires that certified food manufacturers implement and enforce rules to protect the food product against contamination. For example, "[s]moking, chewing, eating, drinking or spitting is not permitted in any food processing or food handling areas," (Jt.App.651 (Section 11.3.1.3)), and "[s]taff shall not eat or taste any product being processed in the food handling/contact zone." (Jt.App.652-653 (Section 11.4.1.1(vi)).)

B. Facts pertaining to Briggs' charges

1. Briggs' May 2013 last chance agreement

SBC's production and sanitation employees have been represented by the Bakery, Confectionery, Tobacco and Grain Millers Union, Local 111 ("Union") in the past. (Jt.App.222.) In July 2013, however, SBC withdrew recognition from the Union after a majority of its employees in the bargaining unit submitted a withdrawal petition. (*See* Jt.App.5.)

The NLRB later found that the withdrawal of recognition was improper, and ordered SBC to recognize the Union. *See S. Bakeries, LLC & Bakery, Confectionary, Tobacco and Grain Millers Union, Local 111*, 364 NLRB No. 64 (2016), *review granted in part, enforcement denied in part*, *S. Bakeries, LLC v. Nat'l Labor Relations Bd.*, 871 F.3d 811, 817 (8th Cir. 2017). Nonetheless, during a four-and-one-half year period, from July 4, 2013 until January 2018, no union was in place.

Lorraine Marks-Briggs ("Briggs") was employed as a bread packer on SBC's Bread Line. (A5.) In 2013, Briggs filed a charge against SBC for imposing a last chance agreement ("LCA") against her for leaving her work station without permission, and the Board found that the discipline was tainted with anti-union animus. *See S. Bakeries, LLC*, 871 F.3d at 825. This Court upheld the Board's petition for enforcement regarding Briggs on January 19, 2018. *See id.*

2. Briggs' October 2015 last chance agreement

In late 2015 and early 2016 (during the time that the Union was not in place), Briggs reported to Bob Buckley, who, in turn, reported to Tony Hagood ("Hagood"), Bread Line Manager. (Jt.App.85.) Hagood has worked in food manufacturing for nearly three decades. (Jt.App.385.)

Hagood was new to the plant, as he was hired on September 28, 2015. (Jt.App.384, 121.) Hagood had no knowledge of Briggs' past union affiliation or activity. (Jt.App.389.)

Briggs previously signed an acknowledgement of the employee handbook and knew there were rules against eating on the production floor. (Jt.App.121-122, 705-716.) After starting at the bakery in late September 2015, Hagood observed employees "grazing" (i.e., eating food product) on the line in violation of the GMPs. (Jt.App.387.) He reminded them that this conduct was not permitted. (*Id.*) Shortly thereafter, he had a meeting with the employees to discuss this type of misconduct and to "draw[a line] in the sand," warning that "[w]e're not going to put up with it any longer. There will be disciplinary action if this continues." (*Id.*) Briggs was present for Hagood's ultimatum. (Jt.App.121, 387.)

Briggs did not comply. (Jt.App.121.) On October 8, 2015, Hagood observed Briggs picking topping off of the apple swirl bread line and eating it on the production floor in violation of Group B, Rules 3 and 13. (A5; Jt.App.388.)

After admonishing Briggs, Hagood sent a disciplinary action form to human resources. (A5; Jt.App.90, 388-389.) Eric McNiel ("McNiel"), who was also a new employee – having begun working as the Human Resource Manager just a few days after the incident, on October 12, 2015 – received the write-up form. (Jt.App.225, 249.) McNiel oversees employee discipline. (Jt.App.227.) He has decision-making authority relative to written warnings, last chance agreements, and terminations. (Jt.App.227-228.) In making termination decisions, McNiel will seek approval from Rickey Ledbetter ("Ledbetter"), SBC's General Manager and Executive Vice President, but ultimately McNiel has final decision-making authority. (Jt.App.228.)

McNiel addressed Briggs' violation of the work rules as one of his first action items at SBC, and he opened an investigation. (Jt.App.249.) McNiel met with Briggs twice, and spoke with Hagood and Doris Ingram, the line lead in the bread department. (Jt.App.250, 252-253, 596-597, 598-599.) Briggs did not dispute that she had eaten off the line, but claimed it "was not a big deal" because "people do it all the time." (Jt.App.251.) McNiel sought to follow up on this claim by seeking details regarding those who Briggs claimed had violated the rule in the

past, but his efforts were stymied by Briggs, who admittedly refused to provide him with any specific names. (Jt.App.251-252, 92, 124.)

McNiel viewed Briggs' conduct as being "a very big problem" because, by taking a piece of bread and putting it in her mouth "it has the potential to contaminate her fingers by whatever's in her mouth and then going back to work on whatever's on the line." (Jt.App.256.) Moreover, Briggs' admission that she did so "every time they run that . . . product" presented a serious issue because she was "contaminating her product and it's going to our customers." (Jt.App.256-257.) Indeed, she was eating off the line right before the product was packaged (not before the baking process, which might have mitigated the unsanitary consequences of her actions). (Jt.App.388.)

Upon completing his investigation, McNiel met with Ledbetter to discuss next steps. Ledbetter recalled that Briggs had a previous final written warning, but McNiel, who had just begun working at the plant, could not find that written documentation. (A5; Jt.App.255.) Thus, rather than terminating her employment by layering in the putative final written warning, SBC placed Briggs under an LCA for her violations of Group B, Rule 3 and 13. (Jt.App.255-256.)

An LCA allows an employee to remain employed on the express written understanding that any future violation of a Group A Rule or a serious violation of a Group B Rule may result in immediate termination of employment. (Jt.App.433.) The LCA also provides that employees may seek internal review of the disciplinary action by filing a written complaint (or appeal) within five days with the Acting Director of Manufacturing. (*Id.*) Briggs signed the LCA, and did not appeal McNiel's decision. (Jt.App.258, 132, 433.)

The October 2015 LCA given to Briggs referenced her past May 2013 discipline, stating: "After a management review of the facts surrounding the incident and your previous record for rule violations, your behavior does call for immediate discharge; however, management has considered all extenuating circumstances, including 24 years of service. Management believes a 'Last Chance Agreement' is more appropriate." (Jt.App.433.) McNiel testified, without contradiction, that he would have imposed the LCA against Briggs regardless of the discipline imposed in May 2013:

> [Q:] Did the last chance agreement from 2013 have anything to do with this second last chance agreement?
>
> [A:] It did not.

* * * *

> [Q:] What did you discuss with Mr. Ledbetter regarding Ms. Briggs at the time of this last chance agreement?
>
> [A:] The discussion we had was about this. And like I said, he did feel that she had – from his memory, she had a previous final written warning, I think is what he called it. And, you know, so I looked for it, and I could not find it, and so we really did it based off of this. Like I said, he knew she had previous disciplinary action, and I think it's notated in her last chance agreement, but it was not taken into consideration for what she had done there.

(Jt.App.254-255.)

McNiel indicated further that if the March 2013 LCA had been the basis of the discipline he imposed in October 2015, the expected discipline would have been termination. (Jt.App.257-258.)

Notably, like Hagood, McNiel had no knowledge that Briggs had engaged in any previous union activity or filed charges with the Board in 2013. (Jt.App.255, 389.) As noted above, SBC had withdrawn recognition from the Union in July 2013 based on an employee withdrawal petition signed by a majority of its employees – more than two years prior to Hagood and McNiel starting work at SBC. (Jt.App.5.) As such, neither Hagood nor McNiel had any involvement in the

proceedings before the Board relating to that event or Briggs' previous charge against SBC.

3. Briggs' February 2016 termination

On January 22, 2016, in response to a disruption in the bread department caused by employee Cheryl Muldrew (*see* Part I.C infra), Hagood and McNiel held individual meetings with employees, including Briggs. At those meetings, they reviewed SBC's work rules and policy prohibiting hostile workplace conduct to deter harassing and violent conduct. (A6; Jt.App.259-261, 133.) Each employee was issued another copy of the Facility Rules and Disciplinary Procedures and SBC's policy against harassment. (Jt.App.260, 133, 600-602.) The employees were encouraged to read and retain these rules and policy to reinforce their personal responsibility for appropriate workplace conduct. (Jt.App.600-602.)

Management made very clear in the meetings that engaging in any conduct prohibited by these rules and policy was a serious offense, that failing to comply with SBC's appeal for cooperation would be considered insubordination, and that the consequence would be disciplinary action up to and including immediate suspension and

discharge. (Jt.App.600-602, 261.) Like the other employees, Briggs signed a confirmation that she had received the Facility Rules and policy against harassment and that management had appealed for her cooperation in complying with them. (A6; Jt.App.261, 133, 600-602.)

Briggs again failed to comply. Just two weeks later, on February 8, 2016, Briggs left her work area without permission and sought to intimidate her coworker Ashley Hawkins ("Hawkins"). (Jt.App.389-390.) According to Hawkins, Briggs had walked from the bread wrap to the bread scaling area and had deliberately walked between Hawkins and Earl Hopson ("Hopson") and intentionally bumped into Hawkins. (A6; Jt.App.183-184, 390, 395-396.) Hawkins reported Briggs to Hagood. (A6.) In turn, Hagood took Hawkins to human resources, who repeated her account to McNiel. (A6; Jt.App.261-262, 390.) Following standard protocol, McNiel opened an investigation and suspended Briggs pending his investigation. (Jt.App.109.)

During the investigation, Hawkins told McNiel that she had been talking to Hopson when Briggs had walked between them, bumping into Hawkins. (Jt.App.261-263, 609-612.) Hawkins and Hopson both recounted that they had been standing in a wide area and there was

ample space for Briggs to go around them. (Jt.App.262-264.) Another employee, Sandra Phillips ("Phillips"), recalled that Briggs had told her about the incident. (Jt.App.274.) According to Phillips, Briggs admitted that Hawkins was in her way, and Briggs had not gone around Hawkins, but instead had brushed shoulders with Hawkins. (*Id.*; Jt.App.429-430.) Briggs reportedly made no attempt to apologize or speak to Hawkins when this happened and was seen laughing right afterwards while looking at Hawkins. (Jt.App.262.) Hawkins told management she felt "violated, and picked on" by Briggs. (Jt.App.609-610.) Hawkins considered dealing with Briggs herself, but knew that retaliating physically would cost her job. (Jt.App.186-187, 204.)

McNiel also interviewed Briggs. (Jt.App.126-127, 262, 273, 605-608.) He asked her about leaving her work station without permission, and Briggs claimed that she always goes to the bread scaling area to wash her hands. (Jt.App.607-608.) This was contradicted by employees who work in that area, including Hopson, a disinterested observer who works the same shift as Briggs and who told McNiel that he had never seen Briggs come over there to wash up. (Jt.App.264-265, 658-661.) Likewise, Hagood testified that employees in the production line would

normally wash their hands in the breakroom restroom area. (Jt.App.391.) Briggs tried to excuse her conduct toward Hawkins by maintaining that Hawkins had been picking on her for about two weeks. (Jt.App.106-107.) Yet, Briggs had not previously complained to management about Hawkins treating her inappropriately. (Jt.App.107.) So while Briggs' testimony about Hawkins' previous conduct toward her lacked exculpatory power, it did explain why she went out of her way to physically intimidate and incite Hawkins.

McNiel concluded his investigation on February 17, 2016. (Jt.App.434-437.) Based on his investigation, McNiel felt that Briggs was trying to create a hostile work environment, that she was out in the work area without permission, and that she had ignored the recent directive from management against workplace harassment. (Jt.App.276.) Thus, McNiel determined that Briggs had violated Group A, Rules 3, 5, 6, and 22 (prohibiting leaving one's work area without permission, harassing or intimidating conduct, and insubordination, respectively) and SBC's policy against workplace harassment and violence. (Jt.App.276.) The fact that McNiel and Hagood had recently met with Briggs and her co-workers to reinforce that they must not

engage in hostile behavior compounded her offense. (Jt.App.276, 285.) McNiel decided to terminate Briggs' employment. (Jt.App.283.) Consequently, Briggs was discharged on February 19, 2016. (A6; Jt.App.113-114, 434-437.)

In the termination paperwork given to Briggs, McNiel referenced her discipline from May 2013. (*See* Jt.App.436-437.) In the interim period between the October 2015 LCA and his investigation into Briggs' harassment of Hawkins, McNiel had found the May 2013 LCA. Yet McNiel would have reached the same decision regardless of the May 2013 discipline:

> [Q:] So you did find the 2013 last chance agreement?
>
> [A:] I did.
>
> * * * *
>
> [Q:] Did that play any role in this termination?
>
> [A:] No.
>
> [Q:] So you would have still reached the decision, even without that last chance agreement?
>
> [A:] Absolutely.
>
> [Q:] Why?

> [A:] Because of the severity of the actions that she took. You know, creating a hostile work environment is very serious. And after just having the [Cheryl Muldrew] incident and us saying, you know – meeting with employees and saying hey, you know, we need to calm it down, this is what's going on, let's stop this, and her signing off on it, we took that in agreeance, that she agreed to what we were asking. So yeah, I felt this would have definitely happened this way.

(Jt.App.284-285.)

4. Briggs' "Do Not Rehire" notation

Hagood wrote "Do Not Rehire" on Briggs' termination paperwork. (A7.) He did so based upon his past practice from his previous employer, and his belief, in addition to her past violations, that the physical nature of Briggs' misconduct warranted such an instructive:

> [Q:] [W]hy did you consider her, as you look at whether the company wanted to rehire her again, ineligible for rehire?
>
> [A:] Because of her previous violations and in the nature, the physical nature of this discharge.
>
> [Q:] Felt it was a serious offense?
>
> [A:] I felt it was, yes.

(Jt.App.392-393.) Hagood still had no knowledge of Briggs' union affiliation. (Jt.App.392.)

C. Facts pertaining to Cheryl Muldrew charge

Cheryl Muldrew ("Muldrew") worked as a Packer/Break Out person in the Bread Department. (Jt.App.7.) On January 14, 2016, McNiel received a complaint that Muldrew threatened a pregnant co-worker. (Jt.App.232-233, 568.) McNiel opened an investigation and placed Muldrew on suspension. (Jt.App.10-11.) Muldrew was not given any instruction not to discuss her suspension with her co-workers. (Jt.App.20.)

McNiel conducted interviews and took written statements. (Jt.App.233-234.) McNiel reasonably concluded that Muldrew had engaged in bullying and harassing conduct in violation of Group A, Rule 5, against workplace violence and harassment. (Jt.App.575-577.) McNiel decided the appropriate discipline for Muldrew would be an LCA. (*Id.*) Muldrew signed the LCA on January 19, 2016 and did not request an appeal. (Jt.App.11-13, 237.) The LCA, which McNiel read to Muldrew, did not include any prohibition against Muldrew's sharing confidential information. (Jt.App.32, 34.)

The LCA was insufficient to curb Muldrew's threatening conduct. The same day that Muldrew signed her LCA, another employee

reported that Muldrew had threatened to retaliate against the person who reported her. (Jt.App.238.) Once again, McNiel placed Muldrew on suspension pending his investigation and took written statements from employees. (Jt.App.17-18, 239, 578-583.) McNiel concluded that Muldrew had again violated Group A, Rule 5, against violent or harassing behavior. (Jt.App.244.) Making matters worse, Muldrew had also engaged in insubordination by failing to comply with the prior warning and continuing to threaten her coworkers. (*Id.*) McNiel made the decision to terminate her employment effective January 27, 2016. (*Id.*; Jt.App.584-585.)

D. Procedural History

Briggs, Muldrew, and the Union filed unfair labor practice charges against SBC. A hearing was held before Judge Arthur J. Amchan on January 11 and 12, 2017, in Hope, Arkansas. The ALJ issued a decision on May 11, 2017, finding merit to certain charges discussed herein. Thereafter, SBC filed exceptions to the NLRB.

On May 1, 2018, a three-member panel of the Board issued a Decision and Order, which is the focus of this petition for review. As it relates to this appeal, the NLRB found that SBC violated Sections

8(a)(1) and 8(a)(3) by: (A) issuing the LCA to Briggs for eating product off the line; (B) discharging Briggs for harassment in the workplace; and (C) marking Briggs ineligible for rehire. (A1.) With each violation, the Board faulted SBC's decision makers for citing and "partially rel[ying] on" Briggs' May 2013 discipline. The Board concluded that SBC failed to present evidence that it would have imposed the same discipline against Briggs absent the May 2013 discipline. (A1-2.) Yet, the Board did not adopt the ALJ's conclusion that SBC violated Section 8(a)(4), finding no evidence of anti-union animus. (*Id.*)

The NLRB also adopted the ALJ's conclusion that SBC violated Section 8(a)(1) by "telling Muldrew not to discuss her discipline with other employees and, later, telling her she was being discharged, in part, for discussing her discipline." (A1.)

This petition for review by SBC followed.

SUMMARY OF THE ARGUMENT

The Board's conclusion that SBC engaged in certain unfair labor practices is unsupported by the evidence and the law. Sections 8(a)(1) and 8(a)(3) of the NLRA protect employees against interference and discrimination for exercising their rights under Section 7 and

encouraging or discouraging membership in any labor organization. *See* 29 U.S.C. § 158. In order to establish a violation of the NLRA, the General Counsel must prove a causal nexus between an employees' protected activity and the discipline imposed by an employer. General Counsel may establish a *prima facie* case by showing that protected activities played a role in the employer's decision, but the employer may ultimately prevail by showing that it would have imposed the same discipline regardless of the protected activity.

Here, the Board accused SBC of improperly relying upon Briggs' May 2013 LCA when it disciplined her for eating food product from the line and harassing and intimidating Hawkins. However, the Board acknowledged the General Counsel's failure to present any evidence of anti-union animus toward Briggs as a result of her past participation in Board proceedings. This finding should also have been applied to the other charges, as there was no evidence that SBC's decision makers were in any way motivated by anti-union animus. Moreover, the Board ignored the context of SBC's actions, which demonstrated that it would have taken the same action regardless of the May 2013 discipline. The NLRB order sets bad precedent for an employer's ability to enforce its

own work rules against product contamination and workplace harassment.

The Board's conclusion that the Company told Muldrew not to discuss her discipline and that she was being discharged for discussing her discipline is not supported by substantial evidence. Rather, by relying on the ALJ's faulted analysis, the Board committed error and failed to take into account all record evidence.

ARGUMENT

This Court "will enforce the Board's order if the Board has correctly applied the law and its factual findings are supported by substantial evidence on the record as a whole. . . ." *ConAgra Foods, Inc. v. NLRB*, 813 F.3d 1079, 1084 (8th Cir. 2016). "In considering whether substantial evidence supports the Board's decision, [the Court] must take into account whatever in the record fairly detracts from its weight, and must view the inherent strengths and weaknesses of the inferences drawn by the Board." *Nichols Aluminum, LLC v. NLRB*, 797 F.3d 548, 553 (8th Cir. 2015) (internal citations and quotation marks omitted). The Board cannot rely on "suspicion, surmise, implications, or plainly incredible evidence" in reaching its decision. *Id.* (citation omitted). The

Board's conclusions of law are reviewed *de novo*. *Cellular Sales of Missouri, LLC v. NLRB*, 824 F.3d 772, 775 (8th Cir. 2016).

I. SBC Did Not Violate Sections 8(a)(1) and (3) by Disciplining Briggs and Marking Her Ineligible for Rehire.

Briggs violated two direct and serious mandates from SBC. First, Briggs contaminated food product by eating food directly off the product line. Second, she harassed and physically intimidated her coworker in the workplace. The discipline meted to Briggs was legitimate and untainted by unlawful animus. The decision makers had no knowledge of Briggs' past union affiliation, and they testified without challenge that they would have made the same decision regardless of her May 2013 LCA. Each charge relating to Briggs is discussed in turn.

A. The October 2015 LCA was not unlawful.

The analysis regarding the issuance of the October 2015 LCA should have been straightforward: Briggs was caught contaminating product by eating toppings off the line. (Jt.App.121.) Her offense was compounded by her decision to ignore a direct mandate from Hagood against such misconduct. (Jt.App.387.) As a result, she was properly issued a LCA for her admitted violation of the work rules. (Jt.App.431-433.)

Despite Briggs' confession that she broke the rules, contaminated food product, and ignored her supervisor's directive, the Board concluded that Briggs' discipline was unlawful. (A2.) To the Board, McNiel's reference to the Briggs' March 2013 LCA irreversibly tainted her October 2015 discipline. The Board accused SBC of failing to offer any evidence that it had ever given an employee an LCA solely for a Group B violation, concluding that "[t]he unlawful May 2013 [LCA] appears to be the only explanation for the severity of [Briggs'] October 2015 discipline." (A2.) This conclusion is unfounded.

First, the Board's analysis is untethered from the NLRA. In order to establish a violation under either Section 8(a)(1) or 8(a)(3), the Board must necessarily establish that SBC's decision makers were motivated to interfere with an employee's Section 7 rights. *See Gen. Elec. Co. v. NLRB*, 117 F.3d 627, 637 (D.C. Cir. 1997) (General Counsel bears the burden of demonstrating that "antiunion animus contributed to the employer's decision to discharge an employee"); *Sears, Roebuck & Co. v. NLRB*, 349 F.3d 493, 503 (7th Cir. 2003) ("General Counsel must show that: (1) the employee engaged in protected activity; (2) the decision maker knew it; and (3) the employer acted *because of antiunion*

animus." (emphasis supplied)). In the absence of evidence of animus, employers may "apply their usual rules and disciplinary standards to a union activist just as they would to any other employee." *NLRB v. Wright Line*, 662 F.2d 899, 901 (1st Cir. 1981); *Nichols Aluminum, LLC v NLRB*, 797 F.3d 548, 554 (8th Cir. 2015).

Here, the Board bypassed both the second and third prongs of the analysis. Given that both McNeil and Hagood joined the Company well after the incidents giving rise to Briggs' March 2013 LCA, there is no evidence to rebut their express denial of knowledge under oath that Briggs had engaged in any type of union or other protected activity two years before their hire. Indeed, even being aware of the 2013 LCA would not have created the necessary nexus between Briggs' union activity and the LCA. Only through sheer suspicion and speculation can the Board conclude that the decision makers knew of Briggs' previous activity; this is especially true given that both managers were hired into what was by then a non-union environment with no obvious traces of past or present union activity.

The Board also improperly skipped to the second part of the *Wright Line* analysis, ignoring the lack of evidence of any anti-union

animus by McNeil and Hagood. To the Board, the fact that McNiel referenced Briggs' March 2013 LCA tainted her October 2015 LCA. (A2.) However, the two cases cited by the Board, *Dynamics Corp.*, 296 NLRB 1252, 1252-55 (1989), *enfd.* 928 F.2d 609 (2d Cir 1991), and *Celotex Corp.*, 259 NLRB 1186, 1186 n.2, 1190-93 (1982), are distinguishable because they relate to attendance policies. In those cases, the discipline arose from unlawfully imposed written warnings which were stacked together to justify the discipline. Here, the rule violation by Briggs – contaminating food product by eating product off the line – was a standalone violation, and did not need to rely on other discipline to amount to a serious violation of the bakery's rules. Stated differently, there was nothing about Briggs' 2015 LCA that was inherently dependent upon her protected activity in 2013 to taint McNeil's disciplinary decision regardless whether he was aware of the circumstances underlying the older discipline.

Moreover, even if the reference to the May 2013 discipline was enough to create a *prima facie* case (and it should not), SBC met its burden of showing that it would have invoked the same penalty regardless of the May 2013 discipline. SBC had a legitimate reason to

place Briggs on a LCA for grazing on the line. Her actions resulted in the contamination of its product; and she admittedly did so "every time they run," confirming that this was not an isolated incident on her part. (Jt.App.256-257, 338-339.) As importantly, Hagood had just drawn a line in the sand about grazing on product; and Briggs was the only person who Hagood saw doing so following his ultimatum. (Jt.App.125.) Hagood warned that there would be serious consequences, and Briggs ignored him. How else is a manager expected to be taken seriously?

The Board overlooked Hagood's ultimatum that employees stop eating on the line or there would be serious consequences, and it also ignored the substantially important interests of SBC to protect the safety of its food product. The Board's implication that Briggs should have received a slap on the wrist – or no discipline at all – reveals that it improperly disregarded food safety and interposed its own notions of workplace justice. Indeed, this abuse of discretion underlies the policy reason to set aside the Board's Decision in this case.

To the Board, the only way that SBC could meet its burden of showing that it would have issued the same discipline would be to show that "it had ever given an employee [an LCA] solely for a Group B

violation." (A2.) But this arbitrary burden was improper. The Board's approach first assumes that there had been a similar example of Briggs' conduct in the past. Indeed, if this were the first time such an offense had been committed, the Company could never meet the burden imposed on it by the Board. It then assumes that McNiel and Hagood were aware of every disciplinary action ever taken by the Company in the decades before their hire because they were now strapped with responding to each new situation in precisely the same manner the Company had handled similar circumstances in the past. The appropriate focus required considering the context in which McNiel and Hagood found themselves, and asking whether they would have reached the same decision absent the May 2013 discipline.

SBC met that burden, presenting evidence regarding the seriousness of Briggs' misconduct and her decision to ignore Hagood's mandate. There was absolutely no evidence that McNiel or Hagood encountered any other employee who violated this ultimatum against grazing, nor was there any evidence to dispute the seriousness or

validity of their concerns.[2] *Cf. Canandaigua Plastics*, 285 NLRB 278, 280 (1987) (finding that where employee ignored warning by employer to stop harassing other employees, employer's determination that further action was necessary was not evidence of disparate treatment because of union activity). There was also no evidence to suggest that McNeil or Briggs poured (or was compelled to pour) over countless records of past discipline to make certain that Briggs' was treated exactly the same as their many predecessors may have dealt with similar acts of serious and dangerous misconduct. The inquiry should not be whether others in the past had ever been treated more favorably by SBC; but rather, whether the decision makers in this case had ever treated similar offenses not involving protected activity more favorably.

Reinforcing that SBC treated Briggs in a just and non-discriminatory fashion, SBC placed her on a LCA rather than terminating her when she committed a dischargeable offense in October 2015 and was already under a final written warning. From a logical perspective, if SBC was motivated by Briggs' earlier discipline from

[2] General Counsel sought to introduce evidence of alleged comparators who had food in the workplace, but none of those comparators ate product directly off the line. (*See* Jt.App.447-450, 451-457, 530-537, 703 (#5), 699-700.)

May 2013, it would have terminated her employment at that time rather than giving her yet another chance. But logic and the Board's conclusion on this matter simply do not intersect.

The seriousness of Briggs' misconduct cannot be overstated, as the risk of product contamination places the health of the general public at risk. *See* Beth Kowitt, "Why Our Food Keeps Making Us Sick," Fortune.com, http://fortune.com/food-contamination (last visited September 20, 2018) (noting that 48 million Americans get sick from food-borne pathogens each year, resulting in an estimated cost of $55.5 billion). Absent evidence that an employer's disciplinary actions are an artifice for unlawful interference with Section 7 rights, the Board is not free to second-guess a company's legitimate decision to take appropriate disciplinary action to curb serious misconduct that violates food manufacturing processes and places consumers' health at risk. Yet, that is exactly what the NLRB did. Briggs' discipline was not unlawful, and the Board erroneously overreached in concluding otherwise.

B. Briggs' discharge in February 2016 was also not unlawful.

The Board next determined that SBC unlawfully terminated Briggs for leaving her work station to physically intimidate and harass

Hawkins. To the Board, this decision was also unlawfully tainted by Briggs' May 2013 discipline. This conclusion was also in error.

The Board implicitly acknowledged that Briggs had committed a Group A violation, but minimized the seriousness of her misconduct. To the Board, the Company "had reason to believe that [Briggs] chose to wash her hands in an area close to coworker Ashley Hawkins to irritate her and that they brushed each other as [Briggs] passed," yet these were "comparatively minor actions." (A1-2.) By minimizing the seriousness of Briggs' misconduct (suggesting that Briggs only meant to "irritate" Hawkins and simply "brushed" her), the Board impermissibly substituted its human resources skills for those of McNiel and concluded that the level of discipline imposed by McNiel was too harsh.

However, as otherwise acknowledged by the Board in dismissing the Rule 8(a)(4) violations, there is absolutely no evidence that McNiel was motivated by anti-union animus. Therefore, there is nothing to suggest that his view of the seriousness of Briggs' misconduct should be discounted. Although McNiel referenced the May 2013 discipline in Briggs' termination notice, he denied that it had any impact on his final

decision. (Jt.App.284-285.) Instead, he believed that the severity of Briggs' misconduct warranted discharge by itself:

> Because of the severity of the actions that she took. You know, creating a hostile work environment is very serious. And after just having the incident and us saying, you know – meeting with the employees and saying hey, you know, we need to calm it down, this is what's going on, let's stop this, and her signing off on it, we took that in agreeance, that she agreed to what we were asking. So yeah, I felt this would have definitely happened this way.

(*Id.*) McNiel's testimony was not contradicted by any witness.

Given McNiel's honest and reasonable belief that Briggs sought to antagonize Hawkins and did so using physical force, McNiel was completely justified in making the decision to terminate Briggs. "[E]mployees have a right to a workplace free of unlawful harassment, and both employees and employers have a substantial interest in promoting a workplace that is 'civil and decent.'" *Martin Luther Mem. Home, Inc.*, 343 NLRB 646, 648-49 (2004), *overruled on other grounds by The Boeing Company*, 365 NLRB No. 154 (2017). Subjecting co-workers to abusive treatment is not what the National Labor Relations Act is intended to protect "and it certainly should not be accepted by an arm of the federal government." *Consolidated Commc'ns, Inc. v. NLRB*, 837 F.3d 1, 24 (D.C. Cir. 2016) (Millett, J., concurring).

Even under the Board's flawed analysis, which relies on General Counsel's extensive discovery into all past disciplinary decisions by SBC, regardless of underlying circumstances or decision makers, numerous other SBC employees have been immediately terminated for similar misconduct of this type. For example:

- On July 27, 2015, Tyrane Harris was discharged for violating Group A, Rules 3, 6, 22 and Group B, Rule 1. (Jt. App.458-460.) Mr. Harris ignored the instruction of his supervisor to report to his team leader for another job assignment, and instead went into a trailer to take a nap. (*Id.*)
- On April 8, 2015, Bessie Flores was terminated for being away from her job without permission in violation of Group A, Rules 3 and 22. (Jt.App.481-487.)
- On April 8, 2015, Logan Ortez was discharged for violating Group A, Rules 3 and 6. (Jt.App.461-463.) Mr. Ortez had been reassigned to the English muffin department, and had a conflict with the lead person. (*Id.*) When his requests for a new assignment were denied, he refused to return to work and was suspended pending the investigation. (*Id.*)

- On March 13, 2015, Benito DeLa Cruz was discharged for walking off the line without permission in violation of Group A, Rules 3 and 22. (Jt.App.475-480.)
- On March 3, 2015, Ashley Hawkins was terminated for violating Group A, Rules 1 and 6, in relation to her entries on the Break Control Log. (Jt.App.491-495.)
- On January 28, 2015, Jeffrey Porter was discharged for violating Group A, Rule 3. (Jt.App.464-466.) Mr. Porter left the plant while he was on paid break to purchase cigarettes. (*Id.*) In doing so, Mr. Porter ignored an instructive given at a Shipping Department meeting that reminded employees about not walking off the job or leaving the worksite during paid breaks. (*Id.*)
- On January 13, 2015, Lonnie Ross was discharged for violating Group A, Rule 3, for leaving the plant during a paid break to take his truck to his wife. (Jt.App.467-469.)
- On July 11, 2014, Derrick Woodley was discharged for violating Group A, Rule 5 and Group B, Rule 15. (Jt.App.470-472.) An investigation revealed that Mr. Woodley was using his cell phone

on the work floor to show pictures of nude women in videos, thereby creating a hostile work environment. (*Id.*)

- On April 7, 2014, Rebecca Gomez was terminated for leaving the plant during a paid break to get lunch. (Jt.App.488-490.)
- On April 7, 2014, Karina Hernandez was terminated for authorizing Rebecca Gomez to leave her work area while on the clock and without a supervisor's permission. (Jt.App.496-500.)
- On March 2, 2012, Shirley Witherspoon was suspended during an investigation and later terminated for using profanity and aggressive behavior toward a coworker in violation of Group A, Rule 5, in violation of a prior warning against such misconduct. (Jt.App.542-551.)
- On August 26, 2011, Jason Burton was terminated for being belligerent toward his supervisor and using profanity toward him in violation of Group A, Rules 5 and 6. (Jt.App.540-541, 555.)

Several of the employees listed above were allowed to return to work under LCAs because they submitted an appeal and described the mitigating circumstances behind their rule violations. (*See* Jt.App.481-487 (Bessie Flores), 475-480 (Benito De La Cruz); 491-495 (Ashley

Hawkins); 488-490 (Rebecca Gomez); 496-500 (Karina Hernandez).) Despite being aware of this mechanism for review, Briggs did not avail herself of this opportunity. (Jt.App.132.) Moreover, that some employees were immediately terminated for misconduct and others were given LCAs does not prove that anti-union animus motivated Briggs' discharge. Rather, "[t]here are simply too many other explanations for [any disparity in rule enforcement] that do not raise concerns under the Act." *New Otani Hotel & Garden*, 325 NLRB 928, 942 (1998).

Here, the Board completely ignored McNiel and Hagood's recent hire by SBC and presumed unawareness of previous union activity in the plant or its long disciplinary history. It also ignored their permissible attempt to distance themselves from past potential lax enforcement of policies by explaining to all employees with respect to both subsequent acts of misconduct by Briggs that no further incidents of such behavior (i.e., eating on the line or harassing other employees) would be permitted.

Specifically, with respect to the harassment issue that resulted in Briggs' discharge, the Board overlooked the context in which Briggs acted – at a time when tensions in her department were at an apex

following Muldrew's threatening conduct toward a pregnant coworker. As importantly, the Board also ignored that, just days prior to this incident, Hagood and McNiel met with Briggs to reinforce the need to comply with SBC's rules and policy forbidding harassment and workplace violence. (Jt.App.259-261, 133, 600-602.) Briggs had even signed a written intent to comply with those rules and policy and been cautioned that non-compliance would be considered insubordination. (Jt.App.600-602.) Having chosen to completely disregard SBC's rules and these prior warnings, Briggs should reasonably have expected to (and should) bear the consequences. And the NLRB has exceeded its authority in reaching a decision to the contrary.

Stated simply, it must be beyond the province of the NLRB to sit as a "super-personnel" function and second-guess the discretion of management in deciding the appropriate discipline to impose on its employees who have engaged in misconduct absent any evidence to suggest that anti-union animus grounded the decision at issue. *See Wilking v. Cty. of Ramsey*, 153 F.3d 869, 873 (8th Cir. 1998) ("[F]ederal courts do not sit as a super-personnel department that reexamines an entity's business decisions. . . . [W]hen an employer articulates a reason

for discharging the plaintiff not forbidden by law, it is not our province to decide whether that reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for the plaintiff's termination." (internal citations omitted)). This is especially true in the context of consumer or employee safety. Here, without legal or factual foundation, the Board has chosen to substitute its judgment as to the proper measure of discipline for Briggs over management's without an adequate foundation to do so. This decision cannot be allowed to stand.

C. The "Do Not Rehire" notation was not unlawful.

The Board also found that SBC acted unlawfully when Hagood wrote "Do Not Rehire" on Briggs' termination paperwork. Hagood explained that he did so based upon his past practice from his previous employer, and that he believed that the physical nature of Briggs' misconduct warranted such an instructive. (Jt.App.392-393.) McNiel corroborated this account. (Jt.App.287-289.) There was absolutely no evidence that Hagood had any animus toward the Union, and Hagood was unaware of Briggs' union affiliation. (Jt.App.392.)

The evidence was undisputed that Hagood had written the notation on the termination checklist in a way that was consistent with

his past practice from his previous employer. Yet, rather than crediting this honest and unrebutted explanation, the Board squinted at the evidence to find a ULP where none could possibly have existed. This conclusion was also in error.

II. SBC Did Not Violate Section 8(a)(1) in its Interactions with Cheryl Muldrew.

The Board adopted the ALJ's conclusion that McNiel ordered Muldrew not to discuss her LCA with anyone, and later told her that she was being discharged for discussing her LCA with coworkers. (A1, A8.) This conclusion is also based on error.

Muldrew's charge was based solely on her self-serving account of what McNiel told her during their meetings. The ALJ credited Muldrew over McNiel "given [McNiel's] incredible testimony regarding [SBC's] use of [Briggs'] May 30, 2013 discipline." (A8.) Yet, as demonstrated above, McNiel's testimony regarding the effect of Briggs' May 30, 2013 discipline is far from "incredible," as McNiel reasonably concluded that he would have made the same disciplinary decisions about Briggs in the absence of the May 30, 2013 LCA.

If the ALJ had not disregarded McNiel's testimony, Muldrew's charges would have been properly dismissed. McNiel denied telling

Muldrew that she should not discuss her discipline with anyone else, explaining his standard practice in interviewing employees was to "let them know that what they're telling me is confidential. That I'm not going to reveal what they're saying unless it's absolutely necessary." (Jt.App.234-235, 245.)

McNiel's account was corroborated by the testimony of at least three disinterested employees who met with McNiel and were called by General Counsel. Gloria Lollis, an employee interviewed by McNiel, testified that McNiel "did not tell me that I wasn't allowed to talk about discipline." (Jt.App.64.) Likewise, Phillips, an individual who has previously filed charges with the Board, testified that when she was interviewed by McNiel relating to the Briggs-Hawkins incident, McNiel did not tell her that she should not talk about it with other employees. (Jt.App.79.) Even Briggs testified that no managers or supervisors ever told her that employees were not to talk about their suspensions or discipline. (Jt.App.162.)

Inexplicably, the Board ignored all of this corroborating evidence in adopting the ALJ's decision. It also overlooked the inconsistency in Muldrew's LCA itself containing no mention of confidentiality with

respect to its terms vis-a-vis the employee (Jt.App.425-428), while crediting the self-interested oral testimony of Muldrew to the contrary. The General Counsel offered no motive for McNiel to require Muldrew to avoid discussing her discipline or to tell her that she was being discharged for doing so. And the Board stunningly glossed over the fact that the General Counsel did not charge the Company with an unfair labor practice for terminating Muldrew, which logically implies that the General Counsel found no evidence that her discussion of her discipline influenced her termination. Indeed, one can be sure that the General Counsel would have pursued Muldrew's claim that she was discharged for an unlawful motive if it had believed her when she said that was precisely what she was told at the time of her termination.

In sum, when McNiel's testimony and that of the other corroborating witnesses is properly considered, the evidence overwhelmingly shows that Muldrew's charges should have been dismissed. This portion of the Decision should also be overturned.

CONCLUSION

Southern Bakeries respectfully requests that the NLRB's May 1, 2018 order not be enforced and for all other appropriate relief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 7,765 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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This brief and the accompany addendum have been scanned for viruses and are virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2018, I electronically filed the foregoing "Brief for the Petitioner" with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in this case who are registered CM/ECF users will be served by the CM/ECF system.

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